Petition

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No. 81-1157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN DOE AND RICHARD ROE
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PAUL MARK SANDLER
1700 Tower Building
222 E. Baltimore Street
Baltimore, Maryland 21202.
Attorney for John Doe
and Richard Roe
Petitioners

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1. Whether there is a fraud exception to the attorney opinion work product privilege permitting the consideration of such privileged material by a grand jury in its investigation of an attorney, who, during the defense of a client, allegedly advised the client to commit perjury and obstruct justice.

2. If a fraud exception exists, whether this case constitutes that extraordinarily rare and compelling situation to invoke the exception.

3. Whether a grand jury should be dismissed or other protection fashioned when it has been exposed to opinion and fact work product materials without compliance with Rule 26(b)(3) of Federal Rules of Criminal Procedure.

4. If the attorney work product privilege is applicable, whether the case should be remanded to permit Petitioner to prove that his release of documents to the client did not constitute a forfeiture of the work product privilege.

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No.

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JOHN DOE, ET AL,

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V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, John Doe, et al. pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 26, 1981.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, as does the opinion of the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 26, 1981. This Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

STATEMENT OF THE CASE

John Doe, Esq. and his partnership, Richard Roe, seek review of an order of the District Court and the United States Court of Appeals for the Fourth Circuit denying their motions relating to the subpoena of their files containing attorney opinion work product by a federal grand jury which is investigating the nature of the representation provided by Doe to a criminally charged attorney client.

A petition for mandamus seeking to compel the District Court to quash the grand jury's subpoena was filed as was an appeal of the Court's Order declining to do so. Since the Fourth Circuit correctly held that Doe could seek direct review to preserve his assertion of the attorney work product doctrine, there was no need to review the mandamus request.

Procedurally, the case developed from the filing by the Government of a motion to compel compliance with a grand jury subpoena duces tecum and a motion to dismiss the grand jury and demand for a return of work product materials filed by Doe and custodian. The opinion work product material consists of documents given by Doe to his

former client who, years later, while incarcerated, gave the documents to the grand jury. The material also consists of a limited number of documents which were provided by the custodian pursuant to the District Court's order and pursuant to a written agreement with the Government. The former client testified before the grand jury in January 1979, alleging that Doe suborned perjury by advising him to testify falsely and conspired to obstruct justice at various times during the defense of three major mail fraud trials extending over a several year period.

On January 22, 1981 the custodian received a subpoena for the law firm records. With the exception of those documents for which the work product privilege was believed applicable, the law firm complied. A motion to dismiss the grand jury was subsequently filed because the grand jury had already been improperly exposed to opinion work product material received directly from the target's former client.

The Government contended that the grand jury was entitled to the documents withheld; that the Petitioners were not entitled to a dismissal of the grand jury; and that the privilege no longer was applicable because of the terminated nature of the earlier litigation.

On July 2, 1981 the District Court determined that the work product privilege, was applicable, but held that the instant case may be that extraordinarily rare and compelling situation in which opinion work product could be compelled by a grand jury subpoena. The Court held that "in order to enforce the present grand jury subpoena, the Government must, *in camera*, make a *prima facie* showing that the target of the investigation was engaging in illegal conduct in connection with his representation of his former client."

On July 13, 1981 the Court conducted an *in camera* hearing and concluded, in a memorandum and order on the following day:

> ". . . that a prima facie showing has been made that the target of the investigation engaged in illegal conduct in connection with his representation of his former client, i.e., subornation of perjury and conspiracy to obstruct justice. The target's opinion work product is subject to the grand jury's subpoena. As to fact work product, the government has made the requisite showing of necessity, hardship and unavailability of the information from other sources. It, likewise, is subject to the subpoena." (App. 41)

In January 1979, Doe learned that his former client had been granted a furlough from Allenwood Federal Prison where he was then serving a five-year term, for purposes of testifying before a grand jury that was conducting an investigation of an unknown nature concerning the target. The former client was seeking Government support for his efforts to have his sentence reduced. It was subsequently rumored that in testifying before the grand jury, the client referred to numerous longhand and shorthand notes of Doe prepared over a several year period which purportedly supported the client's allegations. The documents, believed to be in the hundreds, were left in the client's files and returned following the conclusion of the target's representation.

Over the several years that Doe represented this client, hundreds of files were analyzed to evaluate exposure, with Doe freely recording his concerns and strategy considerations. In most instances, Doe reduced his analysis of materials to shorthand notes, indecipherable by the client but to be referred to by him in the trial of the case. It has been stipulated that the documents returned to the client and given to the grand jury contained opinion and fact work product. The Government concedes that the client did not acquire possession or even become aware of most of the documents until the representation terminated.

The client professed his innocence, and in fact was found not guilty in his first trial. On November 5, 1976, prior to the commencement of the third trial,[1] Doe wrote to the client suggesting he obtain other representation. The client had been criticizing Doe for not letting him testify at the second trial and was complaining about fees. The client unsuccessfully sought other counsel. Doe ultimately agreed to represent the client in the third trial. Subsequent to being found guilty, the client engaged other counsel to pursue his appeal.[2]

As indicated, in January 1979, while incarcerated and actively seeking a reduction of sentence, the client testified that Doe had told him to lie and had committed yet other unknown improprieties. It was not until January 1981 that the law firm's records were subpoenaed, setting in motion these proceedings.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO WHETHER THERE IS A FRAUD EXCEPTION TO THE ATTORNEY OPINION WORK PRODUCT PRIVILEGE, AN ISSUE SPECIFICALLY LEFT UNRESOLVED BY THIS COURT IN UPJOHN.

In *Upjohn Company v. United States,* 49 101 S. Ct. 877

[1] The second trial at which the client did not testify upon the advice of Doe, resulted in a hung jury. Upon advice of counsel, the client had not testified at his first trial. Ignoring similar advice at the third trial, the client chose to testify.

[2] The appellate court's statement (App. 3a) that Doe represented the client on appeal is in error. The client, through independent counsel, maintained his innocence throughout the appellate process including seeking certiorari to this court. 589 F.2d 769 (4th Cir. 1978), 99 S. Ct. 1787, 440 U.S. 980, 60 L. Ed. 2d 24 (1979).

(1981), this Court, referring to the inviolate nature *vel non* of the attorney opinion work product privilege stated:

> "We do not decide the issue at this time. It is clear that the magistrate applied the wrong standard when he concluded that the government had made a sufficient showing of necessity to overcome the protections of the work product doctrine. The magistrate applied the 'substantial need' and 'without undue hardship' standard articulated in the first part of Rule 26(b)(3) . . . as Rule 26 and *Hickman* made clear, such work product cannot be disclosed simply on a showing of necessity and unavailability by other means than was made by the government or applied by the magistrate in this case would be necessary to compel disclosure." *Id.* at 688-89.

Although this Court has left the issue unresolved, the Eighth Circuit in *In Re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973) ("*Duffy*"), held that the public's interest in the search for truth was outweighed by the vital public policy considerations dictating the need for an inviolate opinion work product privilege in the context of an attorney being required to testify before the grand jury.

The Court in Duffy relied on *In Re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966) in holding that alleged subornation of perjury by an attorney during the defense of a client was insufficient justification to undermine the adversary system by creating a fraud exception. The Court concluded:

> "There are, in addition, vital public policy considerations which dictate that the need for protection of an attorney's work product outweigh(s) the public interest in the search for truth. *United States v. Bryan, supra*, 339 U.S. at 331, 70 S. Ct. at 730 . . ." 473 F.2d at 845.

In Re Terkeltoub, supra, involved the effort of the Government to overcome the opinion work product pri-

vilege where the attorney himself was, as here, suspected of suborning perjury. Responding, the Court wrote:

> "And so we start here with a demand that is troublesome on its face — a demand that a lawyer would be forced to testify about his work in supposed defense of a client. Our problem is not solved, but it is affected, by the recognition that this sort of procedure must have at least a slightly chilling impact upon counsel for defendants in criminal cases. Again, this has nothing to do with whether lawyers for their own sakes should be treated better or worse than other people. It has to do with how the public may fare depending on the course followed with applications like the one before us.
>
> The attorney whose testimony is now sought is concerned at the moment with 'perhaps the most critical period of the proceedings' against the defendant . . . 'from the time of . . . arraignment until the beginning of . . . trial, when consultation, thorough-going investigation and preparation [are] vitally important . . . .' *Powell v. State of Alabama*, 287 U.S. 45, 57, 53 S. Ct. 55, 59, 77 L. Ed. 158 (1932). At the heart of the job of 'thorough-going investigation and preparation' is the interviewing of prospective witnesses, hostile as well as friendly. And no lawyer, on any side of any case, would consider it salutary for his client that the opposition knew who was being interviewed and what was being said during such meetings. If a vivid illustration were needed, it is supplied every day in this court house by the government's stout resistance to discovery efforts by defendants in criminal cases." 256 F. Supp. at 685.

The Court held that the Government's charge that the attorney's alleged effort to suborn perjury did not constitute that rare and compelling circumstance which would justify an invasion into an attorney's opinion work product. The Court, however, concluded:

> "Out of abundant caution, we leave open the possibility that still more rare circumstance could justify a demand of the kind here in question." *Id.* at 686.

In addition to *Duffy* and *Terkeltoub, In Re Grand Jury Investigation, Joseph B. Sturgis,* 412 F. Supp. 943 (D.D. Pa. 1976), also concluded that opinion work product is inviolate. In that case, the Court held that an attorney's memorandum of a telephone conversation with a witness was absolutely privileged. *Accord, United States v. Chatham City Corp.,* 72 F.R.D. 630 (S.D. Ga. 1976), which opined that mental impressions of an attorney were not discoverable, and that the privilege is absolute. *Id.* at 643, n.3; *United States v. Bonnell,* 483 F. Supp. 1070, which cited *Duffy* and *Sturgis,* held: ". . . opinion work is absolutely rather than conditionally privileged . . ." *Id.* at 1078; *Kent Corp. v. N.L.R.B.,* 530 F.2d 612 (5th Cir. 1976) held ". . . such materials [opinion work product] . . . are always protected by a properly raised claim of work product privilege regardless of the opposing litigant's needs." *Id.* at 624. *Mervin v. F.T.C.,* 591 F.2d 821 (1978), held ". . . in view of the strong public policy forwarded by the privilege for attorney work product, factual material may be produced as part of attorney work product even though it is not reasonably available to the requestor from another source . . ." *Id.* at 827. *See also, Terivery v. Norfolk & Western R. Co.,* 68 F.R.D. 46, 48 (W.D. Pa. 1975), holding "Rule 26(b)(3) requires the Court to protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney . . ."); *Tobacco and Allied Stocks v. N.V. Transamerica Corp.,* 16 F.R.D. 537, 543 (D. Del. 1954) (probing the mental processes [for an attorney] is palpably improper"); *see also, United States v. Legett & Platt, Inc.,* 542 F.2d 655, 660 (6th Cir. 1976).

In contrast, some courts have recognized a crime or fraud exception to the privilege. For example, in *In Re Grand Jury Investigation,* 599 F.2d 1234 (3rd Cir. 1979), the Court opined that the Government could show good cause to overcome opinion work product privilege as it pertained to witness interview memoranda. The Second

Circuit, in the case of *In Re Grand Jury Subpoena*, 599 F.2d 504 (2d Cir. 1979), held that if the Government can present a strong enough necessity, the privilege could be overcome. The Fourth Circuit has now determined that a *prima facie* showing of wrongdoing by the attorney results in a forfeiture of the privilege.[3]

In *Upjohn v. United States*, 101 S. Ct. 877 (1981), this Court referred to the Duffy and Sturgis opinions for the proposition that some courts viewed the opinion work product privilege absolute and to the latter two cases for the proposition that some courts held the privilege was subject to exception.

These conflicts concerning an issue which is the bedrock of the adversary system justify the grant of certiorari.

II.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE INVIOLATE NATURE OF THE ATTORNEY OPINION WORK PRODUCT PRIVILEGE.

The resolution of the conflict between the need to provide maximum representation to a client by providing a defense attorney with an immunity from intrusion into his documented thought process versus an unwillingness to provide an absolute shield for an attorney to suborn perjury or obstruct justice in the name of vigorous representation presents an issue of paramount public and legal significance.

The long-term public benefit derived from an inviolate opinion privilege outweighs the potential harm resulting

[3] Assuming the existence of a fraud exception, Petitioner maintained that the privileged documents themselves could not be utilized to establish a *prima facie* case. Rather, it was argued that the Court was obligated to assume that the documents were still in the possession of the target in determining whether the requisite showing was established. The Court improperly circumvented this issue by determining that Doe waived the privilege when he returned the documents to his client.

from an occasional abuse that may occur given an absolute privilege. The Government contends that the strong public policy against disclosure is overcome when the attorney himself is suspected of criminal activity. The significance of this matter is grave and its impact upon the adversary system is far-reaching.

In defending a client who insists upon his innocence, an attorney, who encounters exposures in the case, such as contradictions in the client's explanation of the facts or becomes aware of an infinite variety of other indicia of guilt must be free to candidly record his analysis of such exposures so that he may develop strategies which will enable the client's case to be presented in its most favorable light. The role of defense counsel under our adversary system was described in *United States v. Wade*, 388 U.S. 218 (1957):

> ". . . We also insist that he defend his client whether he is innocent or guilty. The state has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witness to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the state to its proof, to put the state's case in the worst possible light, regardless of what he thinks or knows to be the truth . . . . In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth." 388 U.S. at 257-58.

The Court is presented with the opportunity to reemphasize the very purpose for the creation of the work product

privilege and the intention of the drafters of Rule 26(b)(3) when they stated:

> ". . . In ordering discovery of such materials when the required showing has been made, the court *shall protect* against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." (emphasis supplied).

There must be a period within which an attorney's efforts to defend his client is in fact inviolate — a time when he need not concern himself with how his every action and written notation, prepared during difficult and protracted litigation, will appear years later under the harsh glare of hindsight by those who have no feel for what was really happening. Once it has been determined that the opinion work product privilege can be pierced, the mischief that is foreseeable is substantial and constitutes a clear and imminent threat to proper advocacy.

The Court below concluded that the attorney has no greater right in the work product privilege than does the client. Assuming the work product privilege can be raised by the client and that client fraud waives the privilege as to the client, it is incorrect to apply the same standard for the attorney. To do so ignores the distinctions between the attorney client privilege and the work product privilege. The attorney is the owner of the work product privilege and the client the mere beneficiary. The privilege is designed to protect the attorney more than the client. This was even recognized by the Seventh Circuit in its opinion when it wrote:

> "The work product doctrine on the other hand functions not merely (perhaps) not mainly to assist a client in obtaining complete legal advice but in addition to establish a protected area which the lawyer can prepare his case free from adversarial scrutiny." *In Re* Special Grand Jury 1978 Term, 640 F.2d 49, 62 (1980).

Placing the attorney on the same level as the client when evaluating the existence *vel non* of a fraud exception to the privilege overlooks the significance of *Hickman v. Taylor.* Justice Jackson's comment that the importance of the work product doctrine is for the protection of the lawyer and his conclusions that ". . . it too often is overlooked that the lawyer . . . is indispensable to our administration of justice, . . . which would feel the consequences of compelled disclosure," is particularly appropriate in the present case.

In effect, any exception to the privilege which would permit discovery whenever the mental impressions, conclusions, opinions, or legal theories of a lawyer become relevant facts in later litigation against the attorney himself, would constitute a devastating blow to the adversary system. A lawyer could never know how, when, or under what circumstances his work product might become pertinent to a later law suit. He would have no personal control over the development of later suits and issues. As here, a former client could turn his work product into operative facts. Persons litigating against the attorney's former clients could generate applicability of the operative fact exception under the guise of a fraud exception and obtain forced disclosure of opinion work product documents. It would simply be impossible to limit or define the ways in which legal thought or advice might become important to later litigation. Indeed, because a lawyer can never know when a client might become dissatisfied with his representation or worse, the prospect of a legal malpractice action exists in every litigation setting. And it is not a prospect to be ignored by litigators when trials, particularly criminal trials, inherently create losers. If this type of an invasion into a defense attorney's thought process is sanctioned, every defense attorney becomes a convicted client's opportunity to obtain future Government favors as obviously occurred here.

These facts present a classic confrontation between an adversary system as envisioned in *U.S. v. Wade,* 388 U.S. 218 (1957), and the concern of the courts regarding the public's need to investigate criminal conduct.

Subsequent to the client's incarceration, he requested his then counsel to determine what could be done to obtain the Government's support for a petition for reduction of sentence. As a consequence, at a time when the disgruntled client, himself an experienced trial attorney, was solicitous of the Government's cooperation, he testified before the grand jury.

This scenario highlights the dangers of permitting either an operative fact or fraud exception to the opinion work product privilege. Every client convicted of a crime becomes a threat to the attorney who represented him. Attorneys do represent guilty clients. Nevertheless, they must vigorously defend those clients and interject every ethically permissible obstacle to the Government's presentation. The attorney must be able to record all strategy considerations and preparation efforts without fear that the client may later be able to obtain such documents in currying favor from the Government by maintaining that his attorney knew all along that he was guilty and utilize the attorney's opinion work product to further a Government claim against the attorney founded upon obstruction of justice or subornation of perjury. If wrongdoing was committed by Doe during the preparation and trial, the Government is obligated to establish its case before the grand jury by means independent of violation of Rule 26(b)(3). To sanction what has occurred here is a frightening prospect for all litigators.

To permit a fraud exception is to provide the Government with a tool which inevitably will lead to excesses. The controversial, vigorous and imaginative defense counsel who antagonizes the United States Attorney's Office by

the nature of his representation will, either consciously or subconsciously, tread a little softer, knowing that his every recorded thought is susceptible to discovery upon charges of wrongdoing by his client or the Government. The chilling effect upon aggressive and unpopular representation cannot be denied. As the Court held in *In Re Terkeltoub*:

> "But we are not persuaded, balancing the claim of need for the testimony against the potential hurt of it, that there is any sufficient justification in this case." 256 F. Supp. at 686.

If this Court concludes that a fraud or crime exception exists, it should nevertheless grant the writ to consider whether the circumstances of this case present that rare situation where weighty considerations of public policy and the proper administration of justice militate in favor of the discovery of opinion work product. This Court should rule that, before invoking a fraud exception, it must be established that the client was engaged in or planning misconduct; that he sought advice of counsel to further an existing scheme; and that the work product documents had a close relationship to the client's existing or future scheme to commit wrongdoing *at the initiation of the representation.*

Only by applying these stringent standards to the exception can the policy of encouraging uninhibited rendering of advice by trial counsel be preserved. This is the approach adopted by *In Re Murphy,* 560 F.2d 326 (8th Cir. 1977), which did not permit the Government to obtain compelled disclosure of opinion work product from an attorney. That court wrote:

> In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. See *Hickman v. Taylor, supra.* Our unwillingness to recognize an absolute immunity for opinion work product stems

> from the concern that there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against this nondiscovery of an attorney's mental impressions. Absence such a compelling showing, the attorney's opinion work product should remain immune from discovery." 560 F.2d at 336.

Commenting further, the Court opined:

> "Whether there is an implied crime or fraud exception to the work product doctrine of Rule 26(b)(3) is presently an unresolved question. Because Rule 26(b)(3) protects a broader and to some extent, a different type of material than the attorney-client privilege, the traditional exceptions to the attorney-client privilege cannot be automatically engrafted onto the work product doctrine." 560 F.2d at 337, 338.

Leaving open the possibility of a fraud exception, the *Murphy* Court suggested that if such an exception were found to exist:

> ". . . [It] must be established that (1) the client was engaged in or planning a criminal or fraudulent scheme *when he sought the advice of counsel* to further scheme, *and* (2) the documents containing the attorney's opinion work products must bear a close relationship to the client's existing or future scheme to commit a crime for fraud. . . ." 560 F.2d at 338. (emphasis supplied).

There is no continuing wrongdoing alleged in the case *sub judice* such that when the client sought advice of the target he solicited assistance in perpetrating a fraud of a continuing nature. The wrong alleged occurred as a result of defense efforts rather than perpetration of an ongoing fraud with the client.

This Court should adopt the *Murphy* and *Terkeltoub* rulings and conclude that this case does not present circumstances to justify creating a fraud exception.

Finally, the United States Court of Appeals for the Fourth Circuit commented in the case *sub judice* that the attorney John Doe waived his right to invoke the work product privilege, because he turned over to his client the documents in question at a time when the lawyer-client relationship was strained. The court below was clearly erroneous in making this factual determination. There is no support for this finding in the record; counsel and the United States District Court had agreed to proceed at the *nisi prius* level on the limited issue of the fraud exception and its applicability to the facts of the case. Therefore, if waiver looms over a final resolution of this difficult issue presested by this case, it should only be resolved by a remand to the trial court for the development of the appropriate record.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

PAUL MARK SANDLER
1700 Tower Building
222 E. Baltimore Street
Baltimore, Maryland 21202.

Attorney for John Doe, et al.,
Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of _____, 1981, three copies of the aforegoing Petition for Writ of Certiorari were mailed, postage prepaid, to David Dart Queen, Assistant U.S. Attorney, Courthouse, Garmatz Building, Baltimore, MD 21201.

_____

Paul Mark Sandler

APPENDIX

United States Court of Appeals
For The Fourth Circuit

No. 81-1611

In Re: John Doe, et al.,

Petitioners.

In The Case Of Grand Jury Subpoena,
Duces Tecum to Custodian Of
Records, Richard Roe.

No. 81-1612

John Doe, et al.,

Appellants,

v.

United States of America,

Appellee.

In Re: Grand Jury Subpoena,
Duces Tecum to Custodian
of Records, Richard Roe.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Shirley B. Jones, District Judge.

Argued: Sept. 1, 1981 *Decided: October 26, 1981*

Before WINTER, Chief Judge, BUTZNER and SPROUSE, Circuit Judges.

Paul Mark Sandler for Appellants; David Dart Queen, Assistant United States Attorney (J. Frederick Motz, United States Attorney on brief) for Appellee.

SPROUSE, Circuit Judge:

John Doe (appellant) and the law partnership of which he is a member seek review of the order of the district court denying their motions relating to the subpoena of records containing attorney work product by a federal grand jury in Baltimore, Maryland, which is investigating John Doe.[1]

This is both a petition for mandamus seeking to compel the district court to quash the grand jury's subpoena, and an appeal of the court's order declining to do so. The custodian of these records is the subject of the subpoena, and as such falls within the rule that unless and until a witness has been held in contempt, he has no standing to appeal from an order directing him to produce documents before a grand jury. *See United States v. Ryan*, 402 U.S. 530 (1971). John Doe, however, may seek direct review in

[1] To protect the secrecy of the continuing grand jury investigation and to insulate the appellants from adverse publicity in the event indictments are not returned, actual names of those involved are not used in this opinion.

this court in order to preserve his assertion of the attorney work product doctrine. *In re Grand Jury Proceedings*, 604 F.2d 798, 802 (3d Cir. 1979). Therefore, we need not consider the petition for mandamus, since our consideration of the direct appeal resolves the issues presented.

John Doe is an attorney and a member of a small firm in Baltimore. He represented another attorney (client) in three trials in 1975 and 1976 on federal criminal charges. In the first trial, the client was acquitted, and a second trial on different charges ended in a hung jury. At the third trial the client was convicted. Doe, after expressing initial reluctance arising from a fee dispute and other considerations, also represented the client in an unsuccessful appeal of that conviction in this court. The client subsequently informed representatives of the United States Attorney's office in Baltimore that John Doe had advised him to lie during his trials, to bribe witnesses and had otherwise engaged in attempts to procure false testimony.

The United States Attorney instigated a grand jury investigation, and presented to it the testimony of the client concerning these alleged criminal acts of Doe. Also presented to the grand jury were records of the attorney which he had inadvertently turned over to the client after completion of the client's criminal litigation. These records of the attorney contain his handwritten notes or comments which the government contends corroborate the client's testimony that the attorney suborned perjury, conspired to obstruct justice and obstructed justice during the client's trials. The notations concededly comprise both fact work product and opinion work product[2] of the attorney generated in preparation for the trials. Apart from the

[2] By "fact work product" we are referring to those documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney. "Opinion work product" is work product that contains those fruits of the attorney's mental processes.

documents presented to the grand jury by the former client, all or principally all of the attorney's records relating to the client's former trials are deposited in the files of his law partnership. At the government's request, a *subpoena duces tecum* was issued to the partnership, as custodian of Doe's records, ordering it to produce them to the grand jury. The appellant moved to quash the *subpoena duces tecum* on grounds that, as attorney work product, the written material is privileged, and cannot be used in a proceeding against the attorney.[3] The appellant also moved that the attorney's records given to the grand jury by the client be returned to him and that the grand jury be dismissed as having been tainted by its improper consideration of the privileged material.

The district court found that all the involved records were either fact or opinion work product of the attorney, but that if requisite need could be shown, the fact work product must be produced and that the opinion work product might also be subject to subpoena under a fraud exception to the work product rule. The district court, therefore, ordered an *in camera* hearing, requiring the government to demonstrate the need for, and unavailability of, the otherwise privileged material and a *prima facie* case of fraud by the attorney and/or his client during the latter's trial, to determine if the court would compel obedience to the subpoena. After an *in camera ex parte* hearing, the court found that the government had demonstrated a *prima facie* case of fraud, allowing the disclosure of opinion work product. It also found that as to the fact work product, the government had demonstrated a need for the records, and that information contained in them was otherwise unavailable to the government without undue hardship. The court made no specific finding as to the need for, or unavailability of, the opinion work product. In this case, however, a common factual back-

[3] Its use against the client is not in issue. There is no proceeding pending against him, he has waived the privilege and is cooperating with the government in its attempt to obtain an indictment against the attorney.

ground underlies evaluation of the government's need for this material and the unavailability of equivalent information.

The appellant contends that the district court erred in ruling that an attorney does not have an absolute privilege against the use, without the attorney's consent, of any information derived only from attorney opinion work product, arguing that there is no "fraud" exception to the opinion work product rule. The appellant also contends that even if there is such a fraud exception, the circumstances of this grand jury investigation do not compel its application. Further, he argues that the court erred in not requiring a showing of extraordinary need for, and the inability of, obtaining the substantial equivalent of the otherwise privileged documents, and in not requiring the government to establish a *prima facie* case of attorney fraud without reliance upon the disputed documents which the government had obtained from the former client. The appellant raises other points relating to the return of the documents and dismissal of the grand jury which need not be resolved in view of our disposition of the remaining issues.

An attorney must be free to advise clients and prepare their cases for trial without undue interference from the opposition or the government. This concept, inherent in the extraordinary "work product" rule, is a critical attribute of our adversary judicial system. There are exceptions to the rule, but simply stated, an attorney is not required to divulge, by discovery or otherwise, facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation, even if they have been reduced to writing. This has been an historic common law rule of evidence, 8 Wigmore, Evidence § 2318 (McNaughton rev. 1961), and federal courts for three decades have been guided in applying the work product doctrine by the Supreme Court's decision in

Hickman v. Taylor, 329 U.S. 495 (1947). There the Court said:

> Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of any attorney.
>
> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.
>
> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the

> preparation of one's case, discovery may properly be had.

Id. at 510, 511.

Judge Field, in expressing for this court the rationale supporting this rule, said:

> *Hickman* clearly stands for the principle that the integrity of the adversary process must be safeguarded in spite of the desirability of the free interchange of information before trial. Its overriding concern is that the lawyer's morale be protected as he performs his professional functions in planning litigation and preparing his case. This work product immunity is the embodiment of a policy that a lawyer doing a lawyer's work in preparation of a case for trial should not be hampered by the knowledge that he might be called upon at any time to hand over the result of his work to an opponent.

Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 482-83 (4th Cir. 1973) (Duplan I) (footnote omitted).

The rule and rationale of *Hickman* have been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Although expressed in the Federal Rules in terms of discoverability of relevant material in civil cases, the work product principle also applies to criminal trials and grand jury proceedings. *See United States v. Nobles*, 422 U.S. 225 (1975) (criminal trials); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840 (8th Cir. 1975) (grand jury proceedings).

No court construing this rule, however, has held that an attorney committing a crime could, by invoking the work product doctrine, insulate himself from criminal prosecution for abusing the system he is sworn to protect. Courts have spoken of the conflict between two public policies: The policy which underlies the work product rule and which is expressed by *Hickman* and *Duplan I* — that of unfettered representation by attorneys, and the sometimes

conflicting policy that litigants fraudulently abusing the rule should not secure its advantages. *See In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla. 1977). Some courts, without articulating the impact of this latter concern, have spoken in terms of a nearly absolute opinion work product privilege — holding or at least indicating that in only the rarest and most extraordinary of circumstances should the opinion work product privilege be pierced so as to compel involuntary access by the opposing side in civil and/or criminal litigation. *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943 (E.D. Pa. 1976); *In re Terkeltaub*, 256 F. Supp. 683 (S.D.N.Y. 1966). Other courts, although recognizing the crucial necessity of protecting opinion work product, generally have indicated that there may be compelling circumstances in which work product protection will not be available. *Upjohn Company v. United States*, 49 U.S.L.W. 4093 (Jan. 13, 1981); *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326 (8th Cir. 1977). Some have held that the commission of fraud[4] by the client or the attorney during the pendency of litigation, or by the client in seeking the attorney's advice, constitutes an exception to the work product rule. *See In re Grand Jury Proceedings*, 604 F.2d 798 (3d Cir. 1979).

The Supreme Court, in declining to decide whether a "fraud" exception to the work product rule exists said:

> Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. . . . Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. . . . We do not decide the issue at this time. . . .

[4] The term fraud as used here refers to a fraud on the judicial processes perpetrated by a client or his attorney which could be something less than criminal activity, but certainly encompasses criminal activity subverting or attempting to subvert the judicial process.

Upjohn, supra, at 4097 (citations omitted). Likewise, this court recognized the issue but was not called upon to decide it in *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215 (4th Cir. 1976) (Duplan III). The case *sub judice*, however, squarely presents the issue and we hold that there is a fraud exception to the opinion work product doctrine.

Most of the decisions fashioning a fraud exception have dealt with a client's use of an unwitting attorney to carry out a scheme to fraudulently or criminally subvert the normal progress of litigation, holding that such clients forfeit or waive the protection of the work product doctrine. *See In re Grand Jury Proceedings*, 604 F.2d 798 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326, 337 (8th Cir. 1977), and cases cited therein. Appellant here, however, argues that the "privilege" is that of the attorney and not of the client. He argues that clients can waive work product protection as to themselves, but that the client cannot waive it as to the attorney and that fraud does not forfeit the attorney's ability to rely on the work product doctrine. The answer is that the ability to protect work product normally extends to both clients and attorneys, *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980), and the attorney or the client, expressly or by conduct, can waive or forfeit it, but only as to himself, and the fraud exception applies to both attorneys and clients.

The fraud exception to the rule against compulsory disclosure of a lawyer's opinion work product must apply in proceedings against a suspected lawyer equally or even more readily than in a proceeding to obtain the information for use against a client who utilized fraudulent practices to obtain the lawyer's service. *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla. 1977); *see In re Murphy*, 560 F.2d 326, 366 n.19 (8th Cir. 1977). It is true that the lawyer has the ultimate expression of the work product rule, inasmuch as it is his work product and his unfettered representation on behalf of the client which is being protected. The purpose of the work product doctrine

nonetheless is not to endow lawyers as individuals with an untouchable status. The doctrine was designed to assure future litigants uninterrupted and unimpaired access to, and use of, judicial mechanisms. The work product rule recognizes the lawyer's services as an indispensable part of the judicial scheme, but it was not designed as a fringe benefit for protecting lawyers who would, for their personal advantage, abuse it.

We believe that it is the sense of *Upjohn*, *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979), and *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980), that while the protection of opinion work product is not absolute, only extraordinary circumstances requiring disclosure permit piercing the work product doctrine. We acknowledge that the opinion work product rule should be jealously guarded to foster the general policy expressed in *Hickman*, Rule 26(b)(3) and *Duplan I*. While we will not attempt to catalogue all conceivable extraordinary circumstances which would make the fraud exception available, they inevitably exist when an attorney, charged as a fiduciary in the administration of justice, attempts to use the opinion work product rule to shield himself from criminal prosecution arising from his actions in prior litigation. The government presented to the district court a *prima facie* case showing such illegal activity on the part of lawyer John Doe — that he advised his client to lie on the witness stand, and was a knowing participant in a plan to have witnesses testify falsely on his client's behalf, to have documents altered or destroyed and to bribe witnesses with cash payments. We, of course, make no judgment as to the merits of the case, as the *prima facie* showing of fraud on the court was all that was required to support the trial court's action compelling compliance with the *subpoena duces tecum*.

The district court found that the government had proven both a need for the *fact* work product contained in the subpoenaed records and that it could not obtain the equivalent information without undue hardship. The

government represented in argument to the district court that other than the former client, the only source of this information was the witnesses who allegedly gave false testimony at trial. The government argued that obtaining this information from them was not a viable alternative, since they would be put in a position of incriminating themselves, and would probably not have documentary evidence revealing Doe's alleged criminal activity.

The need for the *opinion* work product and the availability of other information similar to it, however, presents a more serious problem. Appellant correctly contends that not only must the government make a *prima facie* showing of fraud, but must show a greater need for the opinion work product material than was necessary in order to obtain the fact work product material. The reason for this is obvious and was well stated in *In Re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977):

> An attorney's thoughts are inviolate, . . . and courts should proceed cautiously when requested to adopt a rule that would have an inhibitive effect on an attorney's freedom to express and record his mental impressions and opinions without fear of having these impressions and opinions used against the client.
>
> It is clear that opinion work product is entitled to substantially greater protection than ordinary work product. Therefore, unlike ordinary work product, opinion work product can not be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. . . . In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. . . . Our unwillingness to recognize an absolute immunity for opinion work product stems from the concern that there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against the nondiscovery of an attorney's mental impressions. Absent such a compelling showing, the

> attorney's opinion work product should remain immune from discovery.

Id. (footnotes and citations omitted). *See also, In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979).

The trial court, in addressing the need and availability requirements here, spoke only in terms of the fact work product in question. This failure to address the requirement of compelling need for the release of opinion work product makes more difficult our task on appeal. The facts on which such a determination must be made, however, are in the record. However the trial court would rule after a remand, we would review its action on these same record facts. Hence, our consideration of this issue is not precluded.

In essence, the government demonstrated a *prima facie* case of conspiracy, obstruction of justice, and subornation of perjury by attorney John Doe, during his representation of the client in the criminal trials. It also demonstrated that it would probably not be able to prosecute John Doe without the evidence, contained in Doe's work product, to corroborate the direct testimony of the client, whose credibility before a jury is obviously less than overwhelming. It also represented that the four witnesses who were allegedly criminally influenced would not cooperate in the investigation of Doe. In addition to the fact that their testifying would raise a serious self-incrimination question, the government has indicated that only access to Doe's files would accurately and completely corroborate or contradict the client's allegations of criminal activity on Doe's part. The government has demonstrated a need for this material and the unavailability of equivalent information meeting the stringent standards suggested by *Upjohn, In re Special September 1978 Grand Jury Proceedings*, and *In re Murphy*. It cannot proceed against Doe without the information and cannot obtain it elsewhere. In this instance, the principles of the work product rule are not served by declining to compel release of these documents. If the grand jury investigation against Doe cannot

proceed, the criminal justice system will stand under a cloud. In such a case, serious allegations of crimes are recognized, but cannot be resolved, because the crimes, if committed, were perpetrated by an attorney/officer of the court.

Finally, the appellant argues that the district court and the grand jury impermissibly considered documents he turned over to the client. His reliance on *United States v. Mitchell*, 372 F. Supp. 1239 (S.D.N.Y. 1973) is misplaced. In that case, the grand jury target's attorney turned over certain documents containing work product to the United States Attorney. The district court suppressed those documents, concluding that the disclosure of that information required not only the attorney's consent, but that of the client. In the case *sub judice*, there can be no doubt that the client has consented to the disclosure of these documents. The more difficult question is whether, by the release of these documents to the client, Doe has forfeited his ability to invoke the work product doctrine.

Recent decisions considering this question have focused on a concern inherent in the work product rule: that since an attorney's work is for his client's advantage, opposing counsel or adverse parties should not gain the use of that work through discovery. The attorney and client can forfeit this advantage, but their actions effecting the forfeiture or waiver must be consistent with a conscious disregard of the advantage that is otherwise protected by the work product rule. Disclosure to a person with an interest common to that of the attorney or the client normally is not inconsistent with an intent to invoke the work product doctrine's protection and would not amount to such a waiver. However, when an attorney freely and voluntarily discloses the contents of otherwise protected work product to someone with interests adverse to his or those of the client, knowingly increasing the possibility that an opponent will obtain and use the material, he may be deemed to have waived work product protection. *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46 (S.D.N.Y. 1979);

see United States v. American Telephone and Telegraph Co., 642 F.2d 1285, 1296 (D.C. Cir. 1980); *see generally* 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024 (1970 & 1981 Supp.). Additionally, release of otherwise protected material without an intent to limit its future disposition might forfeit work product protection, regardless of the relationship between the attorney and the recipient of the material. In other words, to effect a forfeiture of work product protection by waiver, disclosure must occur in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material.

Here Doe's representation of the client had terminated and the material in question was no longer in Doe's possession. In addition, at the time the documents were released, the relationship between Doe and the client was strained due to the client's conviction, loss on appeal, and the conflict concerning Doe's representation and fees, thus vitiating any commonality of interest between Doe and the client. In these particular circumstances, it is difficult to believe that Doe intended to retain control over the client's use or disposition of these documents. Given Doe's apparently unconditional release to the client of the material in question and his failure to take steps to limit the future use of those documents, we can only conclude that Doe substantially and freely increased the possibility of disclosure to, and use by, *anyone* the client desired, including the United States Attorney. Hence, he effectively forfeited any protection provided by the work product rule; the grand jury, and the district court in evaluating the *prima facie* case, properly considered these materials.

The judgment of the district court is affirmed, and the mandate of this court shall issue forthwith.

AFFIRMED.

In The United States District Court
For The District Of Maryland

Civil Action No. J-81-922

IN RE:

Grand Jury Subpoena, etc.

MEMORANDUM OPINION

The present motion to compel compliance with a grand jury subpoena duces tecum requires the Court to decide whether the work product privilege protects an attorney's records from grand jury scrutiny where the attorney himself is the target of an investigation into possible obstruction of justice and suborning of perjury. Because this issue concerns an ongoing grand jury investigation, the Court will not use the names of any of the parties involved, and will only set forth the essential facts.

The subject of the instant subpoena is the records of the law firm of the target of the investigation. The records which are under subpoena relate to the target's representation of a former client in a federal criminal trial. The government has represented that the former client alleges that the target told him to give false testimony in the course of the target's representation of him. After the subpoena was issued, the law firm produced a number of records and retained some, asserting a claim of privilege. Some of the law firm's internal documents were acquired by the grand jury from the former client who received his file upon termination of his relationship with the target.

The government has moved to compel production of these documents. The law firm opposes the motion to compel and moves to dismiss the grand jury on the ground

that it has been exposed to documents which are absolutely privileged. The documents to which the law firm refers are those received from the former client, as well as some documents which were turned over to the grand jury by the law firm which are now claimed to be privileged.

Although the above facts raise an issue of waiver as well as the applicability of the work product privilege, the Court has agreed to address initially the applicability of the privilege to the instant facts and to address the issue of waiver at a later time should it become necessary.

At the outset, it is important to note that the sole privilege which is being asserted is that of work product. The attorney-client privilege clearly has no application as the former client has executed a waiver of that privilege. There is no question that the attorney-client privilege belongs solely to the client and can be waived by him. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

It should also be noted that there are certain factual assumptions which the Court is making for purposes of this opinion by agreement of the parties. The Court assumes that the documents in question were created in the course of the target's criminal representation of the former client. It is also assumed that these documents would enjoy, in the abstract, the description of work-product as to the target. Finally, it is assumed that the relationship between the target and the former client has been terminated and that there exists no ongoing litigation to which the instant documents have any relevance.

The work-product privilege had its origin in *Hickman v. Taylor*, 329 U.S. 495 (1947). In that case, the Supreme Court held that statements of witnesses taken by an attorney during the course of preparation for trial were not discoverable in a civil context without a showing of necessity. The work-product privilege of *Hickman* was

incorporated in Rule 26(b)(3) of the Federal Rules of Civil Procedure which provides in pertinent part:

> (3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Although created in a civil context, the work-product privilege has been made applicable to criminal litigation. *United States v. Nobles*, 422 U.S. 225 (1975). In that case, the Court emphasized the importance of the work-product privilege to criminal justice:

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

Id. at 238.

The work-product privilege embodies an important policy judgment that the system of justice requires that a "lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their

counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). The Court in *Hickman* was obviously concerned that discovery of the processes of preparation would serve as a deterrent to the free and unfettered development of a case by an attorney.

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 511.

Juxtaposed against the "rock" of the work-product privilege is the "hard place" of the traditional broad discretion that the grand jury exercises in pursuing its investigative functions. "The investigative power of the grand jury is necessarily broad if its public responsibility is to be adequately discharged." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). The Supreme Court emphasized the special status of the grand jury in *United States v. Calandra*, 414 U.S. 338 (1974).

> Traditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law. No judge presides to monitor its proceedings. It deliberates in secret and may determine alone the course of its inquiry. The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing of the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular

> individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282 (1919).

Id. at 343. The Court must attempt to reconcile these two competing interests.

It is not disputed and, indeed, it is readily apparent, that the work-product privilege is applicable to grand jury proceedings. *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1978); *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973).

The government does contend, however, that the privilege has no applicability to a situation where the prior criminal litigation has been terminated and there is no ongoing litigation to which the subpoenaed documents relate. The Court finds that the case of *DuPlan Corporation v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1974), disposes of this argument. In that case, the United States Court of Appeals for the Fourth Circuit held that work-product material did not lose its privileged status upon termination of the litigation for which it was prepared. The Court held that reasons underlying the work-product privilege compelled the conclusion that it was not restricted by whether or not the litigation for which the materials were prepared had terminated. "Rather, the thrust of the [*Hickman*] decision was the qualified protection of the professional effort, confidentiality and activity of an attorney which transcends the rights of the litigants." *Id.* at 483. The Court finds that the reasoning applied in *DuPlan* (I) is as compelling, if not more so, in a criminal context. The Court has no trouble concluding that the work-product privilege is generally applicable to the documents in question.

The Court must next examine whether or not the privilege can be overcome. The Court must bifurcate its discussion to comport with the two categories of material covered by F.R.Civ. P. 26(b)(3). The rule provides that

factual work-product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The rule further provides that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Thus, the Court must deal separately with factual work-product and opinion work-product.

The Court has little trouble concluding that factual work-product can be subpoenaed by the grand jury if the government can make the requisite showing under FR.Civ.P. 26(b)(3) of necessity and undue hardship. The case law on this issue generally applies the distinction as between factual and opinion work-product and requires that the requisite showing under F.R.Civ.P. 26(b)(3) be made in order to obtain factual work-product through a grand jury subpoena. *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla. 1977). Therefore, if the government can make the requisite showing of necessity and undue hardship, these materials may be subpoenaed.

The final issue is the point at which the competing interests between the functioning of the grand jury and the work-product privilege come to the point of strongest conflict. The question of whether opinion work-product may be subject to disclosure under any circumstances is one which must be approached with great caution. Rule 26(b)(3) provides that "the court shall protect against" such disclosures. The United States Court of Appeals for the Fourth Circuit has indicated that this language precludes the discovery of opinion work-product. "In our view, no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attor-

ney's mental impressions, conclusions, opinions or legal theories. This is made clear by the Rule's use of the term "shall" as opposed to 'may'." *DePlan Corporation v. Moulinage et Retorderie de Chavanoz*, (DuPlan II), 509 F.2d 730 (4th Cir. 1974).

The Court does not view this language in DuPlan(II) as dispositive. *DuPlan*(II) only addressed this issue in a civil context and does not really address the issue which the government raises in this case. Where the individual claiming the privilege in regard to opinion work-product is the subject of a grand jury investigation as to possible criminal conduct arising out of his representation during the course of which the subpoenaed materials were created, is there an exception to the inviolableness of opinion work-product? The Court believes that more than questions of need and undue hardship are implicated by this question.

There is very little precedent on this issue. The government relies heavily on *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla. 1977). In that case, an attorney moved to quash a grand jury subpoena which required production of material created during the course of representing a former client, on the ground of the work-product and factual work-product, held that "where the work-product materials in question were prepared for a distinct and prior criminal litigation, long completed, the policies underlying the work-product privilege have already been achieved. The only effect of sustaining that conditional privilege now would be to thwart and frustrate the grand jury's investigative task." *Id.* at 653.

In juxtaposition with the foregoing approach is the reasoning of *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966). In that case, the government moved to compel the testimony of an attorney as to his presence at a meeting with his client for the purpose of persuading a witness to

commit perjury. The Court clearly recognized the difficulty in balancing the competing interests at stake:

> On the one hand, there is the heavy weight of history and public need commanding that the grand jury's investigations be as unfettered as possible. And the Government comes here with the laudable purpose of guarding against suspected attacks on the integrity of the judicial process itself. On the other hand, the disclosures now demanded touch a vital center in the administration of criminal justice, the lawyer's work in investigating and preparing the defense of a criminal charge.

Id. at 684 (citations omitted). The Court ultimately held that the attorney should not be compelled to testify. The Court's conclusion seemed to be premised on the government's failure to make a "showing of the kind of vital, urgent, and immediate need for the unique knowledge that might warrant the extraordinary compulsion the government seeks." *Id.* at 686. The Court did not foreclose, however, the possibility that such testimony could be compelled under different circumstances. "Out of abundant caution, we leave open the possibility that still more rare circumstances could justify a demand of the kind here in question." *Id.*

The United States Court of Appeals for the Eighth Circuit held that an attorney could not be compelled to produce or testify with respect to summaries he made and conclusions he drew from witness interviews before a grand jury. *In re Grand Jury Proceedings*, 473 F.2d 840 (9th Cir. 1973). The Court contrasted the facts in the case before it with those in *Terkeltoub*. "In *Terkeltoub* '[t]he testimony sought [dealt] allegedly with a conversation amounting to, or looking toward, the commission of a crime.' In contrast, there is no credible showing in this case that Duffy in his interviews with nonemployees was engaged in the commission of any crime." *Id.* at 843 (citations omitted). The Court held that under the holding of *Hickman*, an attorney's memoranda in regard to

interviews of witnesses were absolutely privileged. The Court also noted that it was not willing to rule beyond the scope of the case before it. "We limit our holding to the facts disclosed by the record in our present case. We do not suggest that the policies supporting the work-product doctrine, and therefore its scope, may not vary somewhat depending upon the nature of the proceeding in question." *Id.* at 849.

In contrast, the United States Court of Appeals for the Third Circuit has held opinion work-product was not absolutely privileged. *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979). In that case, a grand jury had subpoenaed questionnaires and memoranda compiled by counsel during the course of an internal corporate investigation into foreign bribes. The Court classified the questionnaires as factual work-product and held that the government had shown sufficient need in order to obtain them. The memoranda written by counsel as to interviews were classified as opinion work-product and although held not absolutely privileged, were held to be "discoverable only in a 'rare situation.'" *Id.* at 1231. The Court required a showing of good cause to discover these materials and held that the government had failed to make such a showing.

The Court has found only two cases which discuss the existence of a fraud exception to the discovery of opinion work-product. The United States Court of Appeals for the Seventh Circuit applied such an exception in *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980). The grand jury had subpoenaed documents from two law firms in regard to the filing of fraudulent reports by an association. The law firms asserted claims of attorney-client and work-product privilege. The Court held that the attorney-client privilege had been waived by the association by virtue of the government's *prima facie* showing that the association had used the law firms to perpetrate a fraud. As to work-product, the Court held that this showing of fraud by the client would overcome the

privilege as to factual work-product, but not as to opinion work-product.

> We reach this result because we are persuaded that the strong policy disfavoring client fraud requires that the client relinquish the benefit he would gain from the work product doctrine, which benefit is just as real although it is his attorney, rather than he, who asserts the doctrine. We are persuaded, however, that the attorney's mental impressions, conclusions, opinions and legal theories must still be protected in order to avoid an invasion of the attorney's necessary privacy in his work, an invasion not justified by the misfortune of representing a fraudulent client.

Id. at 63. Thus, the Court concluded that it was the lack of culpable conduct on the part of the attorneys themselves which protected their opinion work-product from disclosure.

The United States Court of Appeals for the Eighth Circuit addressed the issue of a fraud exception in the context of civil discovery. *In re Murphy*, 560 F.2d 326 (8th Cir. 1977). The government had brought a civil action against a number of pharmaceutical companies concerning an alleged fraudulently obtained patent. During discovery, the government sought to obtain opinion work-product from law firms which had represented the various defendants. The Court held that opinion work-product "enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Id.* at 336. The Court noted that there may be a fraud exception to this immunity, but held that it would not apply in this case because the government had failed to make a *prima facie* showing that the companies were engaged in fraud when they sought the legal advice of the law firms. The Court, however, elaborated on their conclusion that work-product enjoyed "a *nearly* absolute immunity" as opposed to abolute immunity. "Our unwillingness to recognize an absolute immunity for opinion work-product stems from the concern that there may be rare situations, yet unencountered by this Court, where weighty considerations of public policy and a proper administration of justice

would militate against the non-discovery of an attorney's mental impressions." *Id.* at 336. More significantly, the Court noted that "a court may conclude that opinion work-product is not immune if it contains inculpatory evidence of the attorney's own illegal or fraudulent activity." *Id.* n. 19. Thus, the Court anticipated the situation which has arisen in the instant case.

After examining the relevant precedent, the Court concludes that the competing interests which bear on this issue preclude any absolute conclusion as to whether the opinion work-product privilege or the grand jury's need to investigate is the stronger of the two. Rather, the Court believes that a balanced approach requires rejection of the proposition that opinion work-product is absolutely privileged, but agrees with the Court in *In re Murphy, supra*, that opinion work-product may be discovered only in "very rare and extraordinary circumstances." 560 F.2d at 336.

The Court finds that the approach taken by the Seventh Circuit in *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980) is the most prudent way to protect the attorney's interest in keeping his thoughts inviolate without granting him a virtual shield from prosecution for acts committed in the course of representation of a client. The Court finds that the instant case may very well present the extraordinary situation in which opinion work-product may be subject to grand jury subpoena. Thus, the Court will require that in order to enforce the present grand jury subpoena, the government must, *in camera*, make a *prima facie* showing that the target of the investigation was engaging in illegal conduct in connection with his representation of his former client. Absent such a showing, the Court will not enforce the instant subpoena as to opinion work-product. At the same time, the government shall also make a showing of need and undue hardship as to factual work-product.

Shirley B. Jones,
United States District Judge.

Dated: July 2, 1981.

Opposition

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No. 81-1157

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN DOE AND RICHARD ROE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a grand jury investigating an attorney for obstruction of justice and subornation of perjury in connection with his representation of a former client in a criminal prosecution may subpoena the "opinion work product" of the attorney prepared in connection with that representation, where the government has made a prima facie showing of the attorney's criminal activities, the former client has waived his attorney-client privilege and consented to disclosure of the materials, and the government has established a need for the materials and the unavailability of equivalent evidence elsewhere.

2. Whether petitioner Doe waived his work-product privilege with respect to materials supplied to the grand jury by his former client.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 622 F. 2d 1073. The memorandum opinion of the district court (Pet. App. 15a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1981. The petition for a writ of certiorari was filed on December 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Doe, a Baltimore attorney, currently is the target of a grand jury investigation into possible obstruction of justice and subornation of perjury. Petitioner Roe is the law partnership of which petitioner Doe is a member.

In 1975 and 1976, petitioner Doe represented another attorney in three federal criminal trials. In the first trial the client was acquitted, and a second trial on different charges ended in a hung jury. At the third trial, the client was convicted. The client subsequently informed representatives of the United States Attorney's office in Baltimore that Doe had advised him to perjure himself during the trials, had suggested that he bribe witnesses, and otherwise had attempted to procure false testimony (Pet. App. 3a). The client waived his attorney-client privilege with respect to his representation by Doe and authorized release to the United States Attorney of any materials in the possession of Doe relating to the client (C.A. App. 45).[1]

The grand jury investigating Doe's alleged misconduct heard the testimony of the client. It also was presented with records, consisting of Doe's handwritten notes, which Doe had turned over to the client after completion of the client's criminal trials. These records contained "fact work product" and "opinion work product" generated by Doe in preparation for the trials (Pet. App. 3a).[2] At the time the records were released to the client, the relationship between Doe and the client was strained due to their disagreement about defense strategy at the third trial, the client's conviction, and a fee dispute (*ibid.*; id. at 14a).

Apart from the documents presented to the grand jury by the former client, all of Doe's records relating to the three trials are deposited in the files of his law partnership. A subpoena duces tecum was issued to the partnership, as custodian of the records, ordering it to produce them to the

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[1]"C.A. App." refers to the Joint Appendix in the court of appeals.

[2]As defined by the court of appeals, "opinion work product" is work product that contains the fruits of the attorney's mental processes; "fact work product" is work product that does not contain the impressions, conclusions or opinions of the attorney (Pet. App. 3a n.2).

grand jury. Doe moved to quash the subpoena duces tecum on the ground that, as attorney work product, the material is privileged and cannot be used in a proceeding against him. He also moved, on the same grounds, for return of the records that had been given to the grand jury by the client. Finally, he moved that the grand jury be dismissed, arguing that it was tainted by its improper consideration of the assertedly privileged material (Pet. App. 3a-4a).

The district court held that the "fact work product" must be produced if the government could demonstrate that it had a substantial need for the records and that the information contained in them was otherwise unavailable (Pet. App. 20a). The court further held that the "opinion work product" may be subject to subpoena in extraordinary circumstances under a fraud exception to the work product rule (Pet. App. 25a). In order to come within this exception, the court held, the government must make a prima facie showing, *in camera*, that petitioner Doe "was engaging in illegal conduct in connection with his representation of his former client" (*ibid.*). After an ex parte hearing *in camera*, the court found that the government had established a prima facie case of fraud, allowing the disclosure of the "opinion work product." It also found, as to the "fact work product," that the government had demonstrated its need for the records and the unavailability by other means of the information contained in them (*id.* at 4a).

On appeal, the court of appeals held that the work-product rule, while entitled to great protection, is not available to an attorney who "attempts to use [it] to shield himself from criminal prosecution arising from his actions in prior litigation" (Pet. App. 10a). Finding that the government had presented a prima facie case of such illegal activity by Doe, the court concluded that the doctrine was inapplicable in the instant case (*ibid.*). The court of appeals noted that

although the district court had concluded that the government had made a showing of substantial need for the "fact work product," it had not determined whether there was a need shown for the release of Doe's "opinion work product". However, concluding that the record before it was sufficient for it to make the latter determination, the court of appeals found that the government had amply demonstrated that it "would probably not be able to prosecute John Doe without the evidence, contained in Doe's work product, to corroborate the direct testimony of the client, whose credibility before a jury is obviously less than overwhelming" (*id.* at 12a). Finally, as to the documents presented to the grand jury, the court held that Doe effectively had forfeited any protection provided by the work-product rule when he released the documents to his client without any limitation on their subsequent use (*id.* at 14a).

ARGUMENT

1. Petitioners contend (Pet. 5-15) that certain materials reflecting petitioner Doe's impressions, conclusions, or opinions, prepared in connection with his representation of a criminal defendant, are absolutely immune under the work-product doctrine from production pursuant to a grand jury subpoena. They make this assertion of an absolute privilege even though (i) the government has made a prima facie showing that petitioner Doe engaged in conspiracy, obstruction of justice, and subornation of perjury in the course of that representation; (ii) the client has waived the attorney-client privilege and his interest in the confidentiality of attorney work-product material; and (iii) the government has demonstrated both a need for the material and its inability to obtain the material elsewhere because "the four witnesses who were allegedly criminally influenced would not cooperate in the investigation" of petitioner Doe's conduct. Pet. App. 12a. Like the court of

appeals, however, we believe that the work-product doctrine is not an absolute barrier in the search for truth "when an attorney, charged as a fiduciary in the administration of justice, attempts to use the opinion work-product rule to shield himself from criminal prosecution arising from his actions in prior litigation" (*id.* at 10a).

a. As an initial matter, we question whether the work-product doctrine is significantly implicated in this case at all. That doctrine has evolved as a rule of discovery, barring access by a party in a case, prior to or during trial, to material prepared or compiled by counsel for the opposing party in contemplation of the litigation. It "reflects the strong 'public policy underlying the orderly prosecution and defense of legal claims' " (*United States* v. *Nobles*, 422 U.S. 225, 236-237 (1975), quoting *Hickman* v. *Taylor*, 329 U.S. 495, 510 (1974)) and preserves the adversary system by ensuring a degree of privacy for counsel in preparation for litigation, " 'free from unnecessary intrusion by opposing parties and their counsel' " (*Nobles, supra*, 422 U.S. at 237, quoting *Hickman, supra*, 329 U.S. at 510-511).

If the rule were otherwise, this Court has reasoned, an attorney would be tempted to rely on the work of opposing counsel rather than his own initiative in preparing for trial. There might also be a tendency for a lawyer to shape written material with an eye toward its usefulness to another party rather than his own client, or to decline to reduce certain information, thoughts, or impressions to writing in order to avoid assisting his client's adversary. Moreover, if the attorney's work product were used at trial, he might be forced to testify regarding it, thereby assuming the disfavored dual role of witness and lawyer in the same case. The result, this Court has indicated, would be unfair and demoralizing for the profession, and "the interests of the clients and the cause of justice would be poorly served." *Hickman* v. *Taylor, supra*, 329 U.S. at 511. See generally *id.* at 510-513; *id.* at 516-518 (Jackson, J., concurring); *Upjohn, Co.*

v. *United States*, 449 U.S. 383, 397-398 (1981); *Goldberg* v. *United States*, 425 U.S. 94, 105-106 (1976).

These considerations have little application here. The criminal trials in connection with which the documents in question were created have terminated, as has petitioner Doe's representation of the defendant in those cases. The grand jury has not sought Doe's documents pertaining to his former client because they may be useful in connection with an investigation of the client. Nor has it sought any work product of Doe or his attorney prepared since that representation, in connection with the grand jury's *current* investigation into allegations that Doe suborned perjury or obstructed justice. Thus, this is not a situation in which one party to pending or contemplated litigation—here, the government—may be seeking to take unfair advantage of the trial preparation of opposing counsel, rather than relying on its own initiative. Production of the documents to the grand jury in a case such as this also would not create an incentive for a lawyer zealously but lawfully representing his client to shape or decline to prepare written materials in order to avoid helping his client's opponent, as the Court feared in *Upjohn* and *Hickman*. See *United States* v. *Nixon*, 418 U.S. 683, 712 & n.20 (1974).

Moreover, because petitioner Doe's status in the current grand jury investigation and any prosecution that might ensue is that of a party, not an attorney for a party, production of the documents would not create the potential for putting him in the dual role of attorney and witness should he later testify regarding the documents produced. And, especially here, where the client has been convicted, waived any objection to disclosure of the materials, and fully cooperated with the government, there is no reason to believe that " 'the interests of the client[] and the cause of justice

would be poorly served' "[3] if the law firm were compelled to produce documents that may contain evidence of obstruction of justice and subornation of perjury by an attorney. To the contrary, where a prima facie showing of such conduct by an attorney has been made, production of evidence in his firm's possession that may be relevant to the charges protects the integrity of the adversary system, rather than potentially undermining it as in the cases where the attorney's work product is sought for possible use against the client.

For present purposes, then, the fact that petitioner Doe was acting as a lawyer for another party at the time he prepared or compiled the subpoenaed materials is largely irrelevant. Although the documents sought were attorney work product vis-a-vis the criminal prosecution of the *client* (and, we may assume, other litigation involving the *client*; see note 5, *infra*), in the current investigation of the *attorney* they are like any other materials that may contain evidence of criminal activity.[4] Where the former client has waived any objections, there would appear to be no more reason why a law firm's records should be immune from a grand jury subpoena in these circumstances than would the records of any other organization or firm that may contain evidence of obstruction of justice or subornation of perjury by a member or employee of the firm.[5] See *In re Grand Jury*

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[3] *Upjohn, Co.* v. *United States, supra,* 449 U.S. at 398, quoting *Hickman* v. *Taylor, supra,* 329 U.S. at 511.

[4] See 4 *Moore's Federal Practice* para. 26.64[4], at 26-447 (2d ed. 1981) ("when the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are 'work product' ").

[5] Several courts of appeals, including the court below, have held that the work-product doctrine protects documents prepared in contemplation of particular litigation from discovery in subsequent litigation as well. See, *e.g., Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz,*

Proceedings, 73 F.R.D. 647, 652-654 (M.D. Fla. 1977) (grand jury subpoena of attorney's records where there were "serious allegations of grave criminal activity").

b. In any event, petitioners err in arguing that the immunity from discovery of "opinion work product" is absolute and thereby excuses the law firm from complying with the subpoena in this case.

The courts of appeals that have considered the issue have recognized an exception to the work product privilege where there is commission of fraud by the client during the pendency of litigation or by the client in seeking the attorney's advice. See *In re Special September 1978 Grand Jury*, 640 F. 2d 49, 61-63 (7th Cir. 1980); *In re Grand Jury Proceedings*, 604 F. 2d 798, 802 (3d Cir. 1979); *In re Murphy*, 560 F. 2d 326, 338 (8th Cir. 1977). These courts reason that to allow the privilege in such circumstances would pervert its purpose. This exception corresponds to the exception to the attorney-client evidentiary privilege where a prima facie showing has been made of abuse by the client of the relationship through on-going criminal or fraudulent activity. *Clark* v. *United States*, 289 U.S. 1, 15 (1933). Although other courts of appeals have spoken in terms of an inviolate

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487 F. 2d 480 (4th Cir. 1973); *In re Murphy*, 560 F. 2d 326, 333-335 (8th Cir. 1977); *United States* v. *Leggett & Platt, Inc.*, 542 F. 2d 655, 659-660 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977). But in these cases the same client on whose behalf the lawyer prepared the material was a party to the subsequent litigation, and recognition of the doctrine therefore served to protect the adversary system with respect to the particular controversy or transaction to which the documents pertained, albeit in successive lawsuits. These cases do not support recognition of a work-product privilege in a subsequent action involving the attorney alone. See, *e.g.*, *In re Murphy*, *supra*, 560 F. 2d at 334 (a lawyer must be permitted to amass data and commit his opinions to writing without fear that at some later date an opposing party might "use them against his client").

work-product privilege for materials reflecting an attorney's impressions, conclusions, or opinions, the cases in which they have done so did not present the question of a "fraud" exception. See, *e.g., Kent Corp.* v. *NLRB*, 530 F. 2d 612, 624 (5th Cir. 1976); *United States* v. *Leggett & Platt, Inc.*, 542 F. 2d 655, 660 (6th Cir. 1976), cert. denied, 430 U.S. 945.

In this case, the government presented to the district court a prima facie showing that petitioner Doe had advised his client to lie on the witness stand and that he was a knowing participant in a plan to have witnesses testify falsely, to have documents altered or destroyed, and to bribe witnesses with cash payments. Thus, like the client-fraud cases, this case concerns attorney work product prepared in connection with future or on-going criminal activity. In addition, the court of appeals concluded that the government had demonstrated a need for the material and the unavailability of equivalent information elsewhere, because the four witnesses who were allegedly criminally influenced would not cooperate with the government and would have a possible Fifth Amendment privilege against compelled testimony, and because the testimony of Doe's client, standing alone, might not be sufficiently credible for the case to proceed (Pet. App. 12a). Thus, the court concluded that the government had indicated that "only access to Doe's files would accurately and completely corroborate or contradict the client's allegations of criminal activity" (*ibid.*).[6]

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[6]The district court did not consider whether the government's need for the documents overcame the "opinion work-product" privilege here because, in its view, a prima facie showing of criminal activity creates an *exception* to and forfeits that privilege. C.A. App. 39; cf. *Clark* v. *United States, supra*, 289 U.S. at 15; *United States* v. *Nixon, supra*, 418 U.S. at 712 & n.20. There is no occasion to resolve that issue in this case because, assuming that a showing of need is required even where the fraud exception applies, the court of appeals held that the government had made the requisite showing.

Nevertheless, petitioners argue (Pet. 14-15) that the "fraud" exception, assuming it exists, applies only to client fraud. Of course, where the client is shown to have participated or acquiesced in the attorney's illegal conduct, as is the case here, the client fraud exception is fully applicable. In any event, as the court of appeals concluded (Pet. App. 9a), there is even greater reason to apply the fraud exception with respect to attorney misconduct than client misconduct. Indeed, in view of the purpose of the work-product doctrine to protect the integrity of the judicial process, it would make no sense to permit an attorney to invoke that doctrine to shield himself from investigation and prosecution for such crimes as obstruction of justice and subornation of perjury. In short, the instant case presents the kind of "extraordinary circumstances" in the face of which the privilege for "opinion work product" must give way (*id.* at 10a).

Finally, petitioners err in relying (Pet. 6, 9) on *In re Grand Jury Proceedings*, 473 F. 2d 840 (8th Cir. 1973), as creating a circuit conflict with the decision below. The court in that case was not presented with the question of a "fraud" exception, and it expressly limited its holding to the facts before it. Furthermore, in a more recent case, the Eighth Circuit refused to recognize an "absolute immunity" for "opinion work product" (*In re Murphy, supra*, 560 F. 2d at 336), and it acknowledged that "a court may conclude that opinion work product is not immune if it contains inculpatory evidence of the attorney's own illegal or fraudulent activities" (*id.* at 336 n.19).[7]

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[7]Petitioners also assert (Pet. 6-9) a conflict with a district court decision, *In re Terkeltoub*, 256 F. Supp. 683 (S.D.N.Y. 1966). In that case, the court did allow an attorney to invoke the work-product privilege and thereby to avoid testifying about a meeting of the attorney and his client (the defendant in a criminal prosecution) with a possible witness, in which they allegedly had sought to persuade the witness to testify falsely at the upcoming trial. There, however, the attorney was subpoenaed by the grand jury regarding the possible obstruction of

2. Petitioner Doe contends (Pet. 16) that the court of appeals erroneously determined that he waived his work-product privilege with respect to the materials his former client turned over to the grand jury. This claim was properly rejected by the courts below.

The record shows that when petitioner Doe released the work-product materials to the client, his representation of the client had terminated. In addition, the relationship between Doe and the client was at the time strained due to their disagreement about defense strategy at the third trial, the client's conviction, and a fee dispute. Yet despite these factors, Doe delivered the documents to the client without any limitation on the client's future use of them. In these circumstances, the court of appeals was correct in concluding "that Doe substantially and freely increased the possibility of disclosure to, and use by, *anyone* the client desired, including the United States Attorney" (Pet. App. 14a; emphasis added). Accordingly, Doe forfeited any protection afforded him by the work-product rule, and the materials supplied by the client were properly considered by the

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justice at the very time that he was preparing for trial. In such circumstances, the court stressed, the lawyer's "compelled account of the interview could serve only as potential impairment of his effectiveness at the trial" (*id.* at 686; cf. *United States* v. *Nobles*, *supra*, 422 U.S. at 247 n.6 (White, J., concurring)), although, even then, the court left open the possibility that in another case the attorney's testimony could be required over a work-product objection (*ibid.*). The court recognized, however, that the attorney's Fifth Amendment privilege might stand as an independent obstacle (*ibid.*). Here, in contrast, the documentary evidence was subpoenaed well after the trials and the attorney-client relationship had terminated, and there is, accordingly, no possibility of chilling or distracting the attorney in his on-going representation of the client (compare 256 F. Supp. at 685-686) or any possibility that the fruits of the attorney's testimony about his interview with the witness could be used against the client at the trial for which the attorney was preparing. Moreover, in *Terkeltoub*, unlike the present case, there is no indication that the client had waived any objection to his lawyer's production of evidence.

grand jury. See *United States* v. *American Telephone & Telegraph Co.*, 642 F. 2d 1285, 1296 (D.C. Cir. 1980); *GAF Corp.* v. *Eastman Kodak Co.*, 85 F.R.D. 46 (S.D.N.Y. 1979).

Petitioners argue (Pet. 16) that the court of appeals should have remanded the case to the district court for a determination whether he had waived his work-product privilege. But the opinion of the court of appeals reflects (Pet. App. 12a) that it considered the need for a remand and concluded that, on the record before it, it could make the necessary factual determinations itself. Indeed, petitioners expressly concede (Pet. 5) the existence of the facts upon which the court based its finding of a waiver. In these circumstances, a remand was not required. In any event, this fact-bound issue of waiver with respect to the particular documents turned over to the grand jury by Doe's former client—documents not subject to the subpoena Doe challenges—does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

FEBRUARY 1982

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